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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR ESPINO,

Defendant and Appellant.

B288331

(Los Angeles County
Super. Ct. No. VA145574)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Affirmed and remanded with directions.

Phillip A. Trevino, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Zee Rodriguez and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

On August 2, 2017 Victor Espino approached his sister on the street, swinging a metal pipe and threatening to kill her. He showed his sister the handle of a gun in his pocket and told her she was lucky it was not loaded. Espino then reached into his sister's car, took cash from her purse and used the pipe to break a car window.

On August 12, 2017 Espino and a juvenile confronted 17-year-old Ivan M. Espino threatened to attack Ivan if he did not surrender his money. When Ivan produced only \$2, the juvenile demanded more money and threatened to stab him. After Ivan said he had an ATM card, Espino and the juvenile escorted Ivan to a nearby ATM machine and made him withdraw \$20.

A jury convicted Espino of making a criminal threat (Pen. Code, § 422, subd. (a)), robbery (Pen. Code, § 211), assault with a deadly weapon (a knife) (Pen. Code, § 245, subd. (a)(1)) and misdemeanor vandalism (Pen. Code, § 594, subd. (a)) against his sister, and robbery of Ivan M., all as charged in an amended information. In a bifurcated proceeding Espino admitted he had suffered one prior serious felony conviction (robbery) within the meaning of the three strikes law and Penal Code section 667, subdivision (a)(1). The People dismissed a Penal Code section 667.5, subdivision (b), one-year prior prison term enhancement in furtherance of justice. (Pen. Code, § 1385, subd. (a).)

The trial court sentenced Espino to an aggregate state prison term of 19 years. Espino timely appealed.

DISCUSSION

We appointed counsel to represent Espino on appeal. After an examination of the record, counsel filed an opening brief in which no issues were raised. (*People v. Wende* (1979) 25 Cal.3d

436, 441-442.) On August 30, 2018 we advised Espino he had 30 days within which to submit any contentions or issues he wished us to consider. We have received no response.

At the time Espino was sentenced, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30, 2018 the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss section 667, subdivision (a), serious felony enhancements. (See Stats. 2018, ch. 1013, §§ 1 & 2.)

Following our review of the record, we requested supplemental letter briefs from Espino's counsel and the Attorney General addressing whether this court should remand Espino's matter to allow the trial court to decide whether to exercise its new discretion to strike or dismiss the five-year serious felony enhancement.

Espino's counsel and the Attorney General agree, as do we, that the new versions of Penal Code sections 667, subdivision (a), and 1385 apply to Espino, whose sentence was not final before the effective date of the amended statutes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 ["it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019"]; see *People v. Francis* (1969) 71 Cal.2d 66, 75-76 [Legislature is presumed to intend amendments to Penal Code that give trial court discretion to impose a lower sentence to apply retroactively

to all nonfinal judgments]; *In re Estrada* (1965) 63 Cal.2d 740, 745.)

However, the parties disagree on whether remand is appropriate. The Attorney General argues that remand is unwarranted because the trial court's statements at sentencing "clearly indicated that it would not have dismissed the enhancements in any event," citing *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, and *People v. Chavez* (2018) 22 Cal.App.5th 663, 713, and pointing to the trial court's imposition of the upper term sentence for the robbery of Ivan M., acknowledgment of Espino's recidivism and denial of Espino's request to dismiss his prior strike conviction for robbery under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Although the Attorney General is correct that trial court did not demonstrate leniency in the sentencing decisions it made, we cannot conclusively determine from the record that remand would be a futile act. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [""[d]efendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court""]; *People v. McDaniels, supra*, 22 Cal.App.5th at pp. 427-428 ["no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements" as to which new discretion to strike had been enacted].)

DISPOSITION

Espino's convictions are affirmed, and the matter remanded for the trial court to consider whether to strike the prior serious felony enhancement under Penal Code section 667, subdivision (a).

PERLUSS, P. J

We concur:

ZELON, J.

SEGAL, J.